Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term 1994

Edward J. Petrus, Jr.

Petitioner

v.

United States of America

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether attempting to influence the testimony of a witness, in a noncoercive manner, constitutes obstruction of justice and a violation of 18 U.S.C. § 1503? Congress and the Second Circuit says no; the Fifth Circuit says yes. Does this conflict violate the Constitutional provision that federal statutes should be uniform for all the states? Does this conflict between the Circuits make the statute void for vagueness? Did the sentencing court lack jurisdiction?

2. Whether a physician who is not participating in the Medicare and Medicaid programs can be convicted of violating the Medicare and Medicaid fraud statutes (42 U.S.C. §§ 1395 and 1396)? What constitutes "fraud" versus "abuse?" The Inspector General of the Department of Health and Human Services says its abuse. The Fifth Circuit says its fraud. Does this decision violate the agency's right to interpret the statutes they are administering as upheld by this Court in *Chevron U.S.A. v. Natural Resources Defense Council inc.*[1]?

3. Is a guilty plea voluntary and knowingly made if it is based on erroneous advice by counsel and confusion between the Circuits regarding the interpretation of the statutes? Was the plea agreement voided when it was breached by the prosecutor?

4. Did the district court abuse its discretion and commit harmful error when it dismissed the Petitioner's § 2255 motion under Rule 9(b) and failed to abide by the mandate of the notice requirement?

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[1]467 U.S. 837 (1984).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edward J. Petrus, Jr. respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the Fifth Circuit of the United States.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, **United States of America v. Edward J. Petrus, Jr.**, No. 93-8544 was decided December 27, 1994, affirming the decision of the district court to dismiss his second habeas corpus petition under 28 U.S.C. § 2255 is reproduced in Appendix A.[2]

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[2]Judges Garwood and Higginbotham rendered the decision on the first § 2255 Appeal, *Petrus I*, (87-1932, December 1, 1988) and also the second § 2255 Appeal *Petrus II*, (93-8544, December 27, 1994).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254, and Rule 10 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article IV, Section 2:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

United States Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech,

United States Constitution, Amendment V:

> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,
>
> ... nor be deprived of life, liberty, or property, without due process of law;

18 U.S.C. § 1503, Influencing or injuring officer or juror generally

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or

> property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (As amended October 12, 1982, Pub.L. 97-291, § 4(c), 96 Stat. 1253).

42 U.S.C. §§ 1395nn & 1396h, Medicare offenses and penalties. Subsection (a) amended in 1977 to provide in pertinent part that:

> Whoever ... at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to any such benefit or payment ... shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than five years or both, or (ii) in the case of such a statement, representation, concealment, failure, or conversion by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year, or both.

STATEMENT OF THE CASE

This case involves a physician indicted and convicted for Medicare and Medicaid fraud for submitting claims for services provided while suspended from eligibility. There is no dispute from the government; that the medical services were provided, that the correct charges were submitted, or that the government suffered any loss. Since the physician was suspended from the Medicare and Medicaid programs, he had no provider number, and it was impossible for him to apply for any benefits.

Two office employees admitted that they completed the claim forms based on their personal knowledge of which physician provided the services. The prosecutor indicted the physician for fraud knowing that he had no direct involvement in preparing the claim forms, and that his actions even if deliberate was only abuse and a civil violation. There is no other case where a physician, who was suspended from the Medicare and Medicaid programs, being charged under the Medicare/Medicaid fraud statutes, where the correct services were provided to the patients.

A physician, previously employed by the Eye Center, made a telephone call to the Petitioner, asking for information on patients he had treated. Believing that the doctor was sincere, the Petitioner engaged in a dialogue in an effort to correct the obvious errors stated by the doctor. During the call, the physician's memory of the facts was contrary to the patient's records, and the Petitioner advised the doctor to admit that he did not remember. It was later disclosed during a government hearing, that the doctor had copies of the patient charts, and that he deliberately lied on the telephone to the Petitioner. The Petitioner was subsequently indicted and convicted for obstruction of justice for attempting to persuade a witness to give false testimony before a grand jury. The prosecutor charged a violation of 18 U.S.C. § 1503 knowing that § 1503 did not apply to witnesses after 1982. Congress verified that § 1503 did not apply to witnesses after 1982.

The Petitioner never understood what violations he committed, and during the arraignment hearing asserted his innocence. The sentencing court never explained the essential elements of the violations and erred in accepting the questionable plea. His counsel did not understand what conduct was proscribed to violate the Medicare/Medicaid fraud statutes or whether his conduct resulted in an obstruction of justice in violation of § 1503. Petitioner's guilty plea was thus involuntary and not knowingly made. Counsel also admitted during an evidentiary hearing that he did not file an appeal as requested by the Petitioner.

The prosecutor withheld witness statements that were uncovered during discovery in a later civil case. The prosecutor violated the spirit of *Brady*[3] and subsequently violated the plea agreement.

Petitioner's first § 2255 motion was filed July 1986 and denied October 30, 1987. Appeal (87-1932) *Petrus I*, was filed November 13, 1987, claiming: (1) that attempting to influence the testimony of a witness was not a violation of § 1503 because all references to witnesses were removed in 1982; (2) there was no violation of the Medicare/Medicaid fraud statutes because there was no financial loss to the program; (3) that the guilty plea was involuntary because of ineffective assistance of counsel and that the plea agreement was breached by the prosecutor; and (4) that the sentencing court violated Rule 11. Appeal was denied December 1, 1988, and petition for certiorari filed December 12, 1988 and denied June 26, 1989.

Petitioner's second § 2255 motion was filed April 1, 1992 and denied on June 30, 1993. Appeal (93-8544) *Petrus II*, was filed December 6, 1993 claiming: (1) that his actions did not violate § 1503 and that the sentencing court lacked jurisdiction; (2) that his actions did not violate the Medicare/Medicaid fraud statutes; (3) that the suspension from Medicare and Medicaid

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[3]*Brady v. Maryland*, 373 U.S. 83 (1963).

violated due process and the double jeopardy clause; and (4) that the plea agreement was not voluntary. Appeal was denied December 27, 1994.

Petitioner's second § 2255 motion is supported by newly discovered evidence not previously available consisting of: (1) testimony and documents from an administrative hearing;[4] (2) documents from the FOIA/PA trial;[5] (3) Congress;[6] and (4) new case law.

Petitioner argues that: (1) that a noncoercive attempt to influence the testimony of a witness, as outlined in the indictment, is not a violation of § 1503 as verified by Congress and the Second Circuit; that there was no obstruction of justice; that the sentencing court lacked jurisdiction; and that the Fifth Circuit's decision is in conflict with other Circuits and in error; (2) that the submission of Medicare and Medicaid claims, while suspended from the program as outlined in the indictment, is not fraud, as acknowledged by the agency and statutes; that the sentencing court lacked jurisdiction; and that the Fifth Circuit's decision was in error; (3) that the guilty plea was based on erroneous interpretations of criminal statutes by counsel and the sentencing court, and that the prosecutor breached the plea agreement; and (4) that the district court abused its discretion by dismissing the § 2255 motion under Rule 9(b) since it failed to abide by the mandate of the notice requirement as verified by the Appellate court.

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[4]*Inspector General v. Edward J. Petrus, Jr., M.D. and the Eye Center of Austin*, Docket No. C-147, March 19-24, 1990. Transcript excerpts from the hearing are listed as "Tr." in the petition.

[5]*Edward J. Petrus, M.D. v. U.S. Dept. of Health and Human Services and U.S. Dept of Justice*, Civil Action No. A-86-CA-426, January 22, 1990 (W.D. Tex. 1990).

[6]House Report 100-169, June 18, 1987. U.S. Code Cong. & Admin. News, 100th Cong. 1st Sess, p. 682-711, § 10, 1987.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted because the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the Second Circuit and Congress on whether attempting to influence a witness is a violation of 18 U.S.C. § 1503 (obstruction of justice).

The Fifth Circuit holds that "the law of the Fifth Circuit remains that section 1503 applies to witnesses." See Appendix A, p. 10, n. 6. The Second Circuit holds that "congress affirmatively intended to remove witnesses entirely from the scope of § 1503." **United States v. Hernandez**, 730 F.2d 895, 898-99 (2nd Cir. 1984). In 1988, Congress clarified the conflict between the Circuits by the addition of language to § 1512 to portray a pre-existing legislative intent that § 1512, as opposed to § 1503, addresses the mere advising or urging of a witness to lie. The Fifth Circuit decision, in the instant case, violates Article IV, Section 2 of the Constitution which entitles the citizens of each State the same Privileges and Immunities in the several States.

A. Attempting to Persuade the Testimony of a Witness is not a Violation of § 1503, because Witnesses were Excluded from the Statute in 1982.

On March 7, 1984, the witness called Petrus and informed him that he was subpoenaed to appear before a grand jury and wanted to ask some questions about patients they had seen together. It became apparent to Petrus that the witness was confused about the details and when Petrus asked, "You don't remember?" he was referring to the witness's apparent poor memory. He then advised him to admit that he does not remember if he was not sure of the details. The prosecutor alleged that such advice amounted to advising the witness to give false testimony. Petrus made no false statements or gave any false documents to the witness, prosecutor or grand jury.

Petrus was indicted for violating § 1503 because he allegedly "urged, advised and attempted to persuade" a witness "to give false testimony before said grand jury." See Appendix B. Such actions are not a violation of § 1503. The statute is titled "Influencing or injuring officer or juror generally." A statute's title may be helpful in interpreting ambiguities in the language of a statute. **Russ v. Wilkins**, 624 F.2d 914, 922 (9th Cir), *cert. denied*, 451 U.S. 908 (1980). The statute has no reference to witnesses. All references to witnesses were deliberately removed by Congress in 1982. See VWMA, Pub.L. No. 97-291, 128 Cong. Rec. S.13063. The Fifth Circuit admitted, in its opinion, that § 1503 does not apply to witnesses, and noted that "Petrus correctly observes, [that in] 1982 congressional amendments to section 1503 deleted all references to witnesses." See Appendix A, p. 9.

Congress verified the removal of witnesses from § 1503 in 1988, and held that "culpable conduct be prosecuted under 18 U.S.C. § 1512(b) , rather than under the residual clause of 18 U.S.C. § 1503." See Anti-Drug Abuse Act of 1988, Pub.L. 100-690, 102 Stat. 4181 (See Appendix D). Thus the actions alleged in the indictment are not a violation of § 1503, and the sentencing court lacked jurisdiction.

B. Fifth Circuit Decisions Regarding § 1503.

The Fifth Circuit erroneously ruled:

> This Court, however, has held that Congress did not intend that urging or advising a witness to testify falsely be exempt from prosecution under the omnibus clause of section 1503. **United States v. Branch**, 850 F.2d 1080, 1082 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 816 (1989); **United States v. Wesley**, 748 F.2d 962, 964 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 2664 (1985)."

See Appendix A, p. 9-10.

Both cases cited were misplaced. **Branch** is distinguished since he wrote threatening letters which triggers § 1503. **Wesley** was convicted under § 1512 and § 1503 and the court relied on a prior decision in **United States v. Vesich**, 724 F.2d 451, 453 (5th Cir. 1984), which occurred prior to the VWPA of 1982, which removed witnesses form the statute. The Fifth Circuit also erred when it relied on **United States v. Williams**, 874 F.2d 968 (5th Cir. 1989) which it held, "reaffirming this Circuit's interpretation that § 1503 still applies to witnesses." See Appendix p. 10. In fact the Fifth Circuit in **Williams** found the Defendants guilty of violating § 1503 because they testified falsely before the grand jury and that "their false testimony had the actual effect of obstructing justice." None of the cases relied upon by the Fifth Circuit support the position that attempting to influence the testimony of a witness is a violation of § 1503.

Surprisingly the Fifth Circuit recently ruled that attempting to influence the testimony of a witness is not a violation of § 1503 in **United States v. Pofahl**, 990 F.2d 1456, 1482 (5th Cir. 1993) and **United States v. Graves**, 5 F.3d 1546, 1555 (5th Cir. 1993). In **Graves** the Court held that attempting to influence the testimony of a grand jury witness was not a violation of § 1503 but could be a violation of § 1512(d) and cited with approval **United States v. Masterpol**, 940 F.2d 760, 763 (2nd Cir. 1991). The **Masterpol** Court, 940 F.2d at 763, held that:

> In view of these developments and the plain import of Congress' action in both adopting section 1512 and deleting from section 1503 all references to witnesses, we see no reason at this juncture to retreat from the position we took in **Hernandez**, that "congress affirmatively intended to remove witnesses entirely from the scope of § 1503." 730 F.2d at 898.
>
> Masterpol's obstruction of justice conviction under section 1503 therefore must be reversed.

The law of appellate decisions in the Fifth Circuit is that you can never go back. The same judges that ruled on *Petrus I* felt obligated to maintain the same decison on *Petrus II* regardless of the facts or legal precedents. See Appendix A, p. 13.

C. Other Circuits Decisions Regarding § 1503.

The Fifth Circuit did not dispute the decisions of other Circuits that support the Petitioner's position. See App. br. p. 23-25. In **United States v. Brand**, 775 F.2d 1460 (11th Cir. 1985), the Court found that § 1503 does not apply because "no false statements found its way into the hands of the Assistant U.S. Attorney" ... "nor did any false statement reach the court." The **Brand** Court cited **United States v. Essex**, 407 F.2d 214 (6th Cir. 1969) which held that unless the administration of justice was impeded through any juror or officer of the court, that the mere attempt to secure a statement from a potential witness does not violate § 1503.

In **United States v. Thomas**, 916 F.2d 647, 653 (11th Cir. 1990), the defendant was prosecuted under the omnibus clause of § 1503; the conviction was reversed, and the Court held that "the government must prove the alleged statements had the natural and probable effect of obstructing justice." In **United States v. Bordallo**, 857 F.2d 519, 524-25 (11th Cir. 1988) the Governor of Guam was convicted under § 1512 for urging and advising a witness to give false testimony to a grand jury. The Court discussed § 1512 (witness tampering) noting the Fifth Circuit's holding of "urging and advising" a witness to testify falsely to be limited to § 1512, but not § 1503.

In **United States v. Aguilar**, 21 F.3d 1475 (9th Cir. 1994) Judge Aguilar's conviction for violating § 1503 was reversed because the Court found that: (1) all references to witnesses in § 1503 were removed in 1982; (2) to sustain a conviction under the omnibus clause of § 1503 the defendant's actions must be corruptly or by coercing actions; (3) § 1503 does not bar making false and

misleading statements to grand jury witnesses; and (4) the term "corruptly" as used in § 1503 may be unconstitutionally vague.[7]

D. Section 1503 may be Unconstitutionally Vague.

Section 1503 violates the Due Process Clause of the Fifth Amendment when learned jurists of different Circuits render opposing opinions regarding its meaning. The issue of conflicting statutory interpretation was discussed by the Fifth Circuit in **Springer v. Coleman**, 998 F.2d 320, 322 (5th Cir. 1993) holding:

> A conviction may be unconstitutional if it is obtained under a statute so vague that it does not provide adequate notice of what conduct will be deemed criminal.

The Court quoted **Kolander v. Lawson**, 461 U.S. 352, 367 (1983) which held that:

> The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited ...

The government in its brief (Gov. App. br. p. 22) admitted that the indictment was defective but insufficient to warrant habeas relief and cited **Uresti v. Lynaught**, 821 F.2d 1099, 1102 (5th Cir. 1987) however, that Court held that:

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[7]Two recent district court convictions were reversed by Appellate Courts in: **United States v. North**, 910 F.2d 843 (D.C. Cir. 1990); and **United States v. Poindexter**, 951 F.2d 369 (D.C. Cir. 1991) because the term "corruptly" was found to be too vague to provide constitutionally adequate notice. While both cases involved § 1505, its similarity to § 1503 was discussed, and the court noted that "the terms of § 1505 were borrowed from a 1909 statute that has since become § 1503, an "obstruction of justice statute." 951 F.2d at 380.

> It is well settled, however, that the sufficiency of an indictment is not a matter for federal habeas relief unless the indictment is so defective that the convicting court had no jurisdiction.

The evidence clearly shows that the sentencing court lacked jurisdiction, and the insufficiency of the indictment was properly before the court in the § 2255 motion. Even if the sentencing court had jurisdiction, the conviction should be reversed because attempting to influence the testimony of a witness is not a violation of § 1503.

Is the free speech protection of a citizen abolished when he speaks with a potential grand jury witness? The First Amendment clearly states that; "Congress shall make *no law* ... abridging the freedom of speech." Where does one draw a line between protected speech and permissible government regulations? Justice Black wrote that any law directly aimed at curtailing speech can never be saved by a balancing process. The Petitioner maintains that he is innocent of obstructing justice and that his conversations with the witness were protected by the First Amendment and produced nothing that interfered with the due administration of justice.

The Supreme Court has refused to grant certiorari to cases involving this conflict between Sections 1503 and 1512. Justices White, Brennan and Marshall had indicated that they would grant certiorari to resolve the dispute. See, e.g. **Wesley v. United States**, 471 U.S. 1130 (1985); **Risken v. United States**, 107 S.Ct. 329 (1986); **Rovetuso v. United States**, 474 U.S. 1076 (1986); **Cooper v. United States**, 471 U.S. 1130 (1985). Resolution of § 1503 is important because its progeny §§ 1505, 1510, 1512, and 26 U.S.C. § 7212 demand clarification. See **United States v. Popkin**, 943 F.2d 1535 (11th Cir. 1991). A resolution of the conflict between the circuits is ripe for consideration by the Court.

II. Certiorari should be granted because the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the agency required by Congress to interpret and administer the statutes regarding Medicare and Medicaid fraud.

Petrus was indicted for allegedly submitting claim forms to Medicare and Medicaid for providing services while he was suspended from the programs and placing another doctor's provider number on the form to obtain payment. See Appendix C. The Inspector General of the U.S. Department of Health and Human Services ruled that:

> The submission of claims to the Medicare or Medicaid programs for services provided by a suspended provider is not a violation of the criminal law. It is solely a CMPL violation and as such, remedied only by penalties and assessments imposed pursuant to §1128A of the Act.[8]

The Supreme Court in **Chevron U.S.A. v. Natural Resources Defense Council Inc.**, 467 U.S. 837 (1984) ruled that:

> A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
>
> A court of appeals can only invalidate an administrator's interpretation if that interpretation is unreasonable.

Chevron, 104 S.Ct. at 2783.

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[8]*Inspector General v. Edward J. Petrus, Jr., M.D., and the Eye Center of Austin*, DAB No. C-147, Inspector General's Response to Respondents' Exceptions, p. 115, December 5, 1990.

The Fifth Circuit was noticeably silent on the effect of **Chevron** on this case, and then erred when it ruled that "he [Petrus] was never convicted of submitting claims while suspended" and that "the Inspector General's statement did not specifically characterize the conduct underlying the two relevant counts of conviction (Counts 10 and 24) as noncriminal." See Appendix A, p. 11. The indictment clearly stated that Petrus allegedly provided services while suspended from eligibility for Medicare benefits in violation of § 1395nn(a)(2). The Inspector General was very clear, that a suspended provider who submits claims to Medicare or Medicaid for services he provided does not violate criminal law. The agency considers the act one of "abuse" which is civil, rather than of "fraud" which may be criminal.

A. No Violation of the Medicare or Medicaid Fraud Statutes.

In order to establish a factual basis for adjudicating a defendant guilty of the felony provisions of the Medicare or Medicaid fraud statutes, 42 U.S.C. §§ 1395nn, 1396h,[9] four elements must be present: (1) false statement or misrepresentation; (2) knowingly and willfully made; (3) by the person providing items or services; and (4) that the provider must be enrolled in the program and not suspended or excluded at the time the service is rendered.

The indictment alleges that the Petitioner made or caused to be made a "false statement and representation of a material fact for use in determining *his rights* to Medicare benefits." The Petitioner was suspended from the Medicare program at that time, thus it was impossible for him to make any statement or representation that would ascertain *his right to payment*. Only a provider in the Medicare program has a provider number that gives him a right to payment. The Petitioner has no provider number. Section 1395nn(a)(2) does not make it a felony offense to provide

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[9]Statute was renumbered and amended to 42 U.S.C. § 1320a-7a on August 18, 1987, Pub.L. 100-93.

such services while on suspension. An excluded provider who attempts to circumvent the exclusion is subject only to a heavy monetary penalty.[10] Such conduct is only a civil offense, and a violation of 42 U.S.C. § 1320a-7(a).[11]

Since the Petitioner was suspended from the programs at the time of the alleged actions, and since enrollment in the program is a recognized requirement, it was legally impossible for him to trigger the fraud statutes associated with those programs. The doctrine of legal impossibility was discussed in **United States v. Aguilar**, 21 F.3d 1475, 1482 (9th Cir. 1994). The Court noted:

> The doctrine of legal impossibility has been a part of criminal law for centuries. *See* ***R. v. Carr***, 168 Eng. Rep. 854 (1819) (defendant acquitted on gro-

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[10]Lisa A. Foley and Lewis Morris, Protecting Medicare and Medicaid, An examination of the powers of the Health and Human Services' Inspector General, Federal Bar News & Journal, January 1993, Vol. 40, No. 1., p. 46.

[11]Section 1320a-7(a) of Title 42 provides only civil penalties against a provider for submitting claims while suspended from the program. The Medicare and Medicaid Patient and Program Protection Act stated:

> Under current law, the Secretary may assess a civil monetary penalty against an individual or entity that has been excluded from Medicare and submits claims for medical items or services if the Secretary has initiated termination proceedings. In addition, payment may not be made where the individual or entity knowingly and willfully made any false statement or misrepresentation in requesting payment. The Secretary may, after appropriate notice, also terminate a provider agreement if the Secretary determines that the provider misrepresented a material fact in requesting payment. U.S. Code Cong. & Admin. News, 100th Cong. 1st Sess, p 682-711, 706, §10, 1987.

unds of legal impossibility). Where legal impossibility exists, there can be no violation of a statute.

Aguilar, 21 F.3d at 1482.

No physician was ever convicted of Medicare or Medicaid fraud, when the items or services were actually provided to the patient. All the published cases for Medicare/Medicaid fraud involved providers billing for services or supplies not provided or billing for more extensive services than actually provided while the provider was in the program.

The Medicare/Medicaid fraud statutes were amended in 1977, changing the penalty from a misdemeanor to a felony offense and required that any misrepresentation be "in connection with the furnishing (by that person) of items or services." misrepresentation alone will not suffice without billing for "items or services" that were either unnecessary or were not performed in order to be a felony offense. Thus, *the amended statute had nothing to do with the status of the person who provided the services, but whether or not the services were actually performed.* See H.R. Rep. No. 393, 95th Cong. 1st Sess, Reprinted in 1977 U.S. Code Cong. & Admin. News 3039, 3047-48. (Appendix E).

B. Sworn Testimony Proves No False Claims Submitted.

The sworn testimony of the witnesses during the administrative hearing and briefs of the Inspector General support the Petitioner's position that the prosecutor suppressed exculpatory evidence that the Petitioner did not violate the Medicare/ Medicaid fraud statutes.[12]

The first § 2255 decision by the Appellate Court was based on false information contained in the Government's factual

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[12]*Inspector General v. Edward J. Petrus, Jr., M.D. and the Eye Center of Austin*, Docket No. C-147, March 19-24, 1990.

statement presented at the Arraignment hearing.[13] The Petitioner stated before the sentencing court that he disagreed with the Government's factual summary and that he did not submit any false claims. See Arr. hearing May 2, 1985, p. 70.

C. Prosecutor Withheld Exculpatory Evidence from Petitioner.

The Fifth Circuit erred when it held the prosecutor did not withhold exculpatory evidence regarding the witnesses testimony. See Appendix A, p. 12, n. 7. The sworn testimony of the witnesses contradicted the self serving unsworn account that composed the Government's factual basis. See App. br. p. 29-31. Neither the Government nor the Appellate Court disputed the comparison of the Government's factual claims versus the contradictory testimony (App. br. p. 29); did not dispute the contradictory testimony of Dr. Malsky (App. br. p. 30); and did not dispute the contradictory testimony of Dr. Baer (App. br. p. 31). The witnesses' testimony is now a matter of record and their previous self serving statements have been impeached.

The key issue before the Court was whether the Petitioner provided services to patients and used another physician's provider number. The receptionist, a government witness, testified that she put the provider number on the claim form of the doctor who she saw treat the patient (Tr. 778). She and Ms. Brooks then filed the claim with the physician provider number based on their personal knowledge and signed by Ms. Brooks (Tr. 1155). Petrus never signed any claims (Tr. 1200), did not participate in the preparation of the claims (Tr. 1200), and never reviewed or changed any claims (Tr. 835, 1159-60). Neither the government or the Appellate court disputed these facts.

The prosecutor knew or should have known that the indictment and conviction was based on statements that were false

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[13] *United States v. Petrus*, No. 85-1772 (5th Cir. 1986) (unpublished) (*Petrus I*).

and material, and thus a constitutional violation. **United States v. Chagra**, 735 F.2d 870, 874 (5th Cir. 1984), *cert. denied*, 484 U.S. 859 (1987). The Supreme Court in **United States v. Bagley**, 473 U.S. 667 (1985) held that a conviction must be reversed if based on suppressed evidence. This duty extends both to exculpatory evidence and to evidence that might be used to impeach the government's witnesses. In **Brady v. Maryland**, 373 U.S. 83, 86-87 (1963) the Court ruled that the government must disclose evidence favorable to the defendant that, if suppressed, would deprive the accused of a fair trial. The duty stems from the fact that nondisclosure of such evidence violates due process. The prosecutor violated the spirit of **Brady**, thus depriving the Petitioner of a fair hearing before the grand jury and the sentencing judge.

The Petitioner maintains that he is innocent of violating the Medicare/Medicaid fraud statutes, and that his actions could not be viewed as a criminal violation. The agency acknowledges that his actions were not a criminal violation. Sworn testimony of government witnesses verify that he did not submit any false claims. This Court held that; "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of showing cause for the procedural default." **Murray v. Carrier**, 477 U.S. 478 (1986).

The Petitioner prays that this Court clarify the definition of "fraud" and "abuse" as employed in the Medicare and Medicaid statutes. Many physicians, throughout the country, have stopped treating Medicare and Medicaid patients, because they are confused by the conflicting rulings by the U.S. Department of Health and Human Services and fearful of the draconian consequences. Clerical mistakes can result in criminal charges by overzealous investigators, or heavy civil fines. Professional reputations that have taken years to achieve through sacrifice and dedication can be destroyed in an afternoon. No other profession is as regulated or penalized as the medical profession.

III. The Plea Agreement was not voluntary, violated the Due Process Clause of the Fifth Amendment, and was breached by the Prosecutor.

Petitioner's guilty plea was involuntary and not knowingly made because it was based on erroneous advice by his attorney. Counsel did not understand what conduct was proscribed to violate the Medicare/Medicaid fraud statutes or obstruction of justice as defined in § 1503, and the Petitioner certainly did not understand the legal significance of these statutes. Any guilty plea made under those circumstances was certainly not voluntary.

A. Petitioner's Guilty Pleas was Invalid.

Petitioner's counsel did not understand the meaning of the Medicare and Medicaid statutes and stated during the sentencing hearing:

> "I fully understand that from the Government's perspective if Dr. Petrus received any benefit while he was under suspension that that is fraud." (Sen. Tr. p.8)

The Inspector General stated:[14]

> "The submission of claims to the Medicare or Medicaid programs for services provided by a suspended provider is not a violation of the criminal law. It is solely a CMPL violation and as such, is remedied only by penalties and assessments imposed pursuant to §1128A of the Act."

Petitioner's counsel did not understand the statute's meaning and provided erroneous information and advice which resulted in an involuntary plea.

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[14]Inspector General's Response to Respondents' Exceptions, p. 114, December 5, 1990.

A guilty plea does not waive jurisdictional[15] constitutional rights such as double jeopardy[16] or failure of the indictment to charge an offense,[17] and does not waive the right to challenge the constitutionality of the statute under which the defendant is charged.[18]

In **United States v. Briggs**, 939 F.2d 222, 227-8 (5th Cir. 1991) the Court, on appeal of her § 2255 motion, vacated the conviction based on a guilty plea, and held that:

> In order for a guilty plea to satisfy the requirements of due process, the plea must constitute an intelligent admission of the commission of the offense based on the receipt of real notice of the true nature of the charge. The defendant must have "a full understanding of what the plea connotes"; in particular, she must "possess[] an understanding of the law in relation to the facts." A plea is not voluntary if the accused "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." (citations omitted)...

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[15]*Menna v. New York*, 423 U.S. 61 (1975)(per curiam)(guilty plea cannot waive double jeopardy claim since claim is that government may not prosecute defendant regardless of factual guilt).

[16]*United States v. Baugh*, 787 F.2d 1131, 1132 (7th Cir. 1986)(per curiam)(guilty plea did not waive claim that information or indictment violated double jeopardy).

[17]*United States v. Edrington*, 726 F.2d 1029, 1031 (5th Cir. 1984)(guilty plea no bar to challenging sufficiency of indictment which on its face failed to allege key element of offense); *United States v. Lopez*, 704 F.2d 1382, 1385 n.3 (5th Cir. 1983)(guilty plea no bar to claim that indictment on its face failed to allege offense), *cert. denied*, 464 U.S. 935 (1984).

[18]*United States v. Gaertner*, 583 F.2d 308, 311-12 (7th Cir. 1978)(per curiam).

> Simply put, to convict someone of a crime on the basis of conduct that does not constitute the crime offends the basic notions of justice and fair play embodied in the Constitution. (citation omitted)...
>
> in sum, she alleges that she pleaded guilty to a crime which she now understands not to encompass her conduct, and therefore, her plea of guilty was not knowing and intelligent.

Petitioner's conduct did not violate criminal law, therefore his plea of guilty was not knowing and intelligent. The testimony relied on to convict the Petitioner has now been recanted through subsequent testimony given in the civil proceeding. Recanted testimony, is grounds for relief from a conviction when it either bears on a witness's credibility or directly on the defendant's guilt. See **Williams v. Griswald**, 743 F.2d 1533, 1541 (11th Cir. 1984) (quoting **Napue v. Illinois**, 360 U.S. 264, 269 (1959).

The U.S. Department of Justice reported that guilty pleas account for 9 out of 10 convictions. Although new information was provided, the Appellate court resorted to res judicata by maintaining the decision reached in the first § 2255 appeal even though based on impeached testimony. The defense of res judicata is not applicable to § 2255 motions. **Sanders v. United States**, 373 U.S. 1 (1963). The Appellate court erred when it held that the Petitioner's guilty plea was valid.

B. Plea Agreement was Breached by the Prosecutor.

The Appellate Court erred when it held that the Petitioner abandoned the issue of the prosecutor breaching the plea agreement. See Appendix A, p. 14, n. 8; Appeal. br. Appendix E, motion for summary judgment, p. 25-26. In fact the government breached the plea agreement prior to and after the sentencing hearing.

In the plea agreement, the government agreed "not to make

any recommendation as to sentence." The prosecutor subsequently proceeded to violate the plea agreement by: (1) making a recommendation to the parole officer in the PSI report using an incorrect dollar amount to the offenses, thus affecting the sentence; see **United States v. Avery**, 589 F.2d 906 (5th Cir. 1979); **United States v. Shanahan**, 574 F.2d 1228 (5th Cir. 1978); and (2) by opposing the recommendation for a sentence reduction, by vigorously and vindictively presenting hearsay regarding the Petitioner; see **United States v. Arnett**, 628 1162 (9th Cir. 1979); **United States v. Ewing**, 480 F.2d 1141 (5th Cir. 1973); **Santobello v. New York**, 404 U.S. 257 (1971).

In **Avery**, the Fifth Circuit held that if the Government agreed to remain silent at the time of sentencing, but provided comments in the presentence report, the plea agreement was breached, and the Court vacated sentence. In **Arnett**, the court affirmed the **Ewing** decision by vacating sentence when the government breached the plea agreement by opposing the Rule 35 motion to reduce sentence.

The Petitioner presented evidence and supporting case law that the Government breached the terms of the plea agreement. In **United States v. Whittie**, 25 F.3d 250, 262 (5th Cir. 1994) the court held that:

> Whether the government has violated the terms of the plea agreement is a question of law, which on appeal is reviewed de novo. **United States v. Valencia**, 985 F.2d 758, 760 (5th Cir. 1993).
>
> In determining whether the government has breached a plea agreement, the court must determine "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." **Valencia**, 985 F.2d at 761 (citing **United States v. Huddleston**, 929 F.2d 1030, 1032 (5th Cir. 1991)). The defendant must prove the underlying facts that establish a breach by a preponderance of the evidence. **United States v. Hernan-**

dez, 996 F.2d 62, 64 (5th Cir. 1993).

The Court in **United States v. Maybeck**, 23 F.3d 888 (4th Cir. 1994) reversed the district court's denial of petitioner's § 2255 motion. Maybeck pled guilty, did not file a direct appeal, but later filed a § 2255 motion claiming that "he had been improperly sentenced" "and that he had not knowingly and voluntarily entered his guilty plea." The Court ruled that the cause and prejudice standard of **United States v. Frady**, 456 U.S. 152 (1982) applies to collateral challenges to unappealed guilty pleas. The Court noted:

> United States Supreme Court has recognized that it is an unacceptable deviation from our fundamental system of justice to automatically prevent the assertion of actual innocence simply because a defendant has not observed procedural avenues available to him. In **Engle v. Isaac**, 456 U.S. 107, 135, 102 S.Ct. 1558, 1575-76, 71 L.Ed.2d 783 (1982), the Supreme Court said that since the concepts of cause and prejudice are not rigid, but "take their meaning from ... principles of comity and finality ..., [i]n appropriate cases those principles must yield to the imperative of correcting a fundamentally unjust incarceration ... [W]e are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." *Id.* In **Murray v. Carrier**, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649-50, 91 L.Ed.2d 397 (1985), the Court, although cautioning that it would not always be true, instructed that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."

Maybeck, 23 F.3d at 892.

The **Maybeck** Court quoted **Jones v. Arkansas**, 929 F.2d 375, 381 (8th Cir. 1991) which held that:

> It would be difficult to think of one who is more "innocent" of a sentence than a defendant sentenced under a statute that *by its very terms* does not even apply to the defendant.

In **United States v. Rodriguez**, 23 F.3d 919, 920 (5th Cir. 1994) the Court vacated the district court's sentence and noted:

> A sentence is imposed in an illegal manner if the court fails to comply with the procedural rules in imposing sentences. **United States v. Valesquez**, 748 F.2d 972, 974 (5th Cir. 1984). Once it is found that the district court failed to comply with a procedural rule of sentencing, a new sentencing hearing should be ordered. *Id.*

In **Precin v. United States**, 23 F.3d 1215, 1217-18 (7th Cir. 1994) the Court discussed the standards for § 2255 relief:

> Ordinarily, under 28 U.S.C. § 2255, a conviction can be reversed for "an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." **Borre v. United States**, 940 F.2d 215, 217 (7th Cir. 1991).

The Court went on to note that when "issues raised in a section 2255 proceeding have not been raised in a direct appeal, the party seeking relief must establish cause and prejudice for the failure." Precin claimed that his attorney's representation was constitutionally deficient and that his advice caused him to plead guilty to a charge which (1) had no basis in fact, (2) was not sufficiently explained to him, and (3) was based on inadmissible statements. The Court agreed that "ineffective assistance of counsel may excuse a procedural default" and that the petitioner must demonstrate: (1) deficient performance by the attorney, and (2) prejudice from the representation." **Lockhart v. Fretwell** ___ U.S. ___, 113 S.Ct. 838, 842 (1993).

C. Petitioner's Sentence Was Illegal.

The Fifth Circuit erred when it stated that, "[t]he district court sentenced Petrus to consecutive three-year prison terms on each of the three counts and assessed a $55,000 fine." (Appendix A, p. 2). Two of the three-year prison terms were *concurrent* for an aggregate sentence of six (6) years, not nine (9) years as claimed by the court. The sentencing court ordered:

> that the sentence imposed on count 24 shall run consecutively to the sentence imposed on count 10 and the sentence imposed on count 31 shall run consecutive to the sentence imposed on count 10.

It is necessary for the court to indicate the sequence of sentences when consecutive sentences are imposed. **Payne v. Madigan**, 274 F.2d 702 (9th Cir. 1960). If the sequence is not adequately specified, the sentence must be deemed to run concurrently. **United States v. Daugherty**, 269 U.S. 360 (1926). The Petitioner's sentence was illegal, and illegally implemented.

	COUNT 10 (3 Years)	3 Years
COUNT 24 (3 Years)	COUNT 31 (3 Years)	3 Years
		6 Years [19]

[19]The aggregate sentence is six (6) years not nine (9) years as stated in error by the Appellate court, therefore Petitioner's sentence was illegal. The Petitioner served thirty-six (36) months of incarceration. Petitioner's PSI report indicated a range of 14 to 20 months, based on an alleged loss of $23,220.65. The U.S. Attorney incorrectly calculated the dollar amount, and refused to provide the figures until six months after incarceration started. The U.S. Parole Commission guidelines were retroactively changed on October 3, 1985, and reduced the incarceration time to 12-18 months for the inflated dollar figure, or less than 10 months for a dollar figure under $20,000. A plea to correct this manifest injustice

IV. The district court abused its discretion and committed harmful error when it dismissed the Petitioner's § 2255 motion under Rule 9(b) and failed to abide by the mandate of the notice requirement.

Appellate Court admitted that the district court violated Rule 9(b) of § 2255 because "our review of the record reveals that the district court did not furnish Petrus with the requisite notice and opportunity to respond" but that "the district court's failure to notify Petrus of its intention to dismiss his second petition under Rule 9(b) was harmless error." See Appendix A, p. 6-7. Since the errors committed by the district court affected substantial rights, the harmless error rule does not apply. Fed. R. Crim. P. 11(h) and 52(a).

Petitioner showed that the newly discovered evidence was not previously available, which meets the cause requirement, and prejudice is evidenced by the reasonable probability that the new evidence would have changed the results of the proceeding. See **Strickland v. Washington**, 466 U.S. 668 (1984). The court erred when it held that "our review of the record convinces us that there are no facts Petrus could have alleged to avoid dismissal under Rule 9(b)." See Appendix A, p. 9.

A. District Court abused its discretion when it dismissed the § 2255 Motion under Rule 9(b).

The district abused its discretion when it dismissed the § 2255 petition because the court: relied on erroneous findings of fact; improperly applied the law; and rendered an arbitrary decision. The government's statement of facts is an example of misinformation allowed to persist after sworn testimony contradicted the facts and exposed the faulty conclusions. The Court in **Haworth, Inc. v. Steelcase, Inc.**, 12 F.3d 10-90, 1092 (Fed. Cir. 1993) held that:

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was ignored by the court.

> an abuse of discretion exists where the court's decision relies on clearly erroneous findings of fact, **Christian Schmidt Brewing Co. v. G. Heileman Brewing Co, Inc.**, 753 F.2d 1354, 1356 (6th Cir), *cert. dismissed*, 469 U.S. 1200, 105 S.Ct. 1155, 84 L.Ed.2d 309 (1985), improperly applies the law or uses an erroneous legal standard, id., or is simply arbitrary and unjustifiable in view of the circumstances, **N.L.R.B. v. Guernsey-Muskingum Elec. Co-Op., Inc**, 285 F.2d 8, 11 (6th Cir. 1960).

B. Petitioner's § 2255 Motion is not an Abuse of the Writ.

28 U.S.C. § 2255 sets forth four grounds upon which a federal prisoner may base a claim for relief: "(1) 'that the sentence was imposed in violation of the Constitution or laws of the United States;' (2) 'that the court was without jurisdiction to impose such sentence;' (3) 'that the sentence was in excess of the maximum authorized by law;' and (4) that the sentence 'is otherwise subject to collateral attack.'" **Knight v. United States**, 37 F.3d 769, 772 (1st Cir. 1994) quoting **Hill v. United States**, 368 U.S. 424, 426-27 (1962).

Transgressions of constitutional rights were evidenced by: false charges of violating federal statutes; wrongfully charging the Petitioner under color of federal law; withholding favorable exculpatory evidence; accepting an involuntary plea agreement; violating the plea agreement; maintaining an illegal sentence; and dismissing a habeas corpus petition under res judicata. Violations of the law cannot be used to enforce law. Justice Clark wrote in **Mapp v. Ohio**, 367 U.S. 643, 659 (1961):

> Nothing can destroy a government more quickly than its failure to observe its own laws ...

The sentencing court lacked jurisdiction because the Petitioner's actions as outlined in Counts 10 and 24 (Medicare and Medicaid fraud) were determined by the agency not to be criminal; and the actions as outlined in Count 31 (obstruction of justice) are

not a violation of § 1503. Additionally, the actions as outlined in the indictment - did not happen - as evidenced by the sworn testimony. Arguably, even if the events described in the indictment did occur - it still would not be a violation of the statutes.

The agency violated the Petitioner's constitutional rights when it suspended him in 1983. See Appendix A, p. 14-15. The violation of due process and the double jeopardy clause is well outlined in the brief. See Appellant's brief, p. 35-41. The Petitioner was prosecuted twice, by the same agency for the same offense in violation of the Double Jeopardy Clause as noted in **Grady v. Corbin**, 110, S.C.t 2084, 2093 (1990). The agency then violated the 1983 contract, and violated the Petitioner's due process rights by the "bounty system" established within the agency. In **Malashenko v. Bowen**, CV-F-87-533, E.D. Cal., June 19, 1990, the court ruled that "an OIG merit pay system deprived Malashenko of due process." That same system also deprived the Petitioner of due process.

The Court in **Kuhlmann v. Wilson**, 477 U.S. 436, 454 (1986) held that the miscarriage of justice exception would allow successive claims to be heard if the petitioner "establish[es] that under the probative evidence he has a colorable claim of factual innocence." The Petitioner maintained his innocence during the arraignment hearing, and the uncontested transcript excerpts serve as a basis that his Statement of facts provide probative evidence of factual innocence. One may avoid dismissal of a successive claim by making a "proper showing of factual innocence." **Herrera v. Collins**, ___ U.S. ___, 113 S.Ct. 853, 862 (1993). The Appellate court's decision is a justification of the initial decision rather than a review of it. When the district court and the Appellate court chose not to correct the illegality, they assumed the responsibility for the prosecutor's actions and the result of those actions.

The Petitioner has been injured as a result ot this illegal conviction. The felony conviction has prevented him from obtaining employment, malpractice insurance, participation in a

HMO (health maintenance organization), or obtain appointment to a hospital staff. He is currently unemployed and unemployable.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit is wrong in this case. Victor Hugo once said that "nothing is more powerful than an idea whose time has come." It would be a good idea for this Court to resolve the conflict between the Circuits regarding the obstruction of justice statutes, and announce the appropriate standards for fraud and abuse in the Medicare and Medicaid statutes to be applied in this and like cases.

For these reasons, Petitioner Edward J. Petrus, Jr. respectfully prays that this Court issue a writ of certiorari.

Respectfully submitted,

Edward J. Petrus, Jr.
3413 Spanish Oak Dr.
Austin, Texas 78731
(512) 454-6500
Petitioner Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on the Solicitor General, Department of Justice, Washington, D.C. 20530, by United States mail, on the 26th day of March, 1995

Edward J. Petrus, Jr.

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8544
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

EDWARD J. PETRUS, JR.,

Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas

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(A-92-CA-182(A-84-CR-114))

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.
GARWOOD, Circuit Judge:

Defendant-appellant Dr. Edward J. Petrus, Jr. (Petrus) appeals the district court's dismissal of his second motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. We affirm.

Facts and Proceedings Below

On October 19, 1984, a federal grand jury handed down a thirty-six count indictment charging Petrus with eighteen counts of submitting false Medicare claims, ten counts of submitting false Medicaid claims, and eight counts of obstruction of justice. On May 2, 1985, pursuant to a plea agreement, Petrus pleaded guilty to one count of submitting a false Medicare claim in violation of 42 U.S.C. § 1395(a)(2) (Count 10), one count of submitting a false Medicaid claim in violation of 42 U.S.C. § 1396(h)(a)(2) (Count 24), and one count of obstruction of justice in attempting to suborn perjury of a grand jury witness in violation of 42 U.S.C. § 1503

(Count 31). In accordance with the plea agreement, the remaining thirty-three counts were dismissed.[1] The district court sentenced Petrus to consecutive three-year prison terms on each of the three counts and assessed a $55,000 fine.[2] Petrus did not appeal his conviction. He did, however, file a motion to reduce his sentence under Federal Rule of Criminal Procedure 35(b). The district court denied this motion, and this Court affirmed the judgment of the district court on appeal. *United States v. Petrus,* No. 85-1772 (5th Cir. July 23, 1986) (unpublished) (Petrus I).

The facts surrounding Petrus's conviction stem from his Austin, Texas, ophthalmology practice. In January 1980, Petrus formed the Eye Center of Austin. In June 1982, Medicare notified Petrus that he would be suspended from Medicare and Medicaid as a result of certain events in 1979 related to the submission of Medicaid claims. After filing for an injunction to prevent his suspension, Petrus entered a settlement in which he agreed to a six-month suspension form Medicare and Medicaid beginning May 12, 1983.[3]

Because a significant number of Petrus's patients at the Eye Center of Austin were covered by either Medicare or Medicaid, Petrus hired Dr. Paul Malsky, a Kileen, Texas, ophthalmologist, to see all his Medicare and Medicaid patients during his suspension. Petrus's staff applied for and received Medicare and Medicaid

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[1]In exchange for Petrus's plea, the government also agreed not to make any recommendation at sentencing and not to "criminally prosecute" Petrus for federal offenses relating to "other Medicare and Medicaid claims submitted by the Eye Center of Austin between May 12, 1985 and May 2, 1985 (the date of the agreement). The record indicates that the government complied with this agreement.

[2] Petrus was sentenced before the effective date of the United States Sentencing Guidelines.

[3] Petrus asserts that he was not informed of the effective date of this suspension until some time in June 1983.

provider numbers for Dr. Malsky. In Count 10 of the indictment to which Petrus pleaded guilty, the government alleged that Petrus provided medical services to a Medicare patient and billed Medicare for these services using Dr. Malsky's provider number. After confronting Petrus about the use of his Medicare provider number, Dr. Malsky disassociated himself from the Eye Center of Austin on October 12, 1983, citing Petrus's continuous lies and evasiveness about the treatment and billing of Medicare and Medicaid patients.

Around October 1, 1983, Petrus advertised for a physician to replace Dr. Malsky. Dr. Gregory Baer of San Antonio responded to the advertisement and agreed to start working at the Eye Center of Austin on a part-time basis. Again, Petrus's staff acquired Medicare and Medicaid provider numbers for Dr. Baer. In Count 24 of the indictment, to which Petrus pleaded guilty, the government alleged that Petrus provided medical services to a Medicaid patient and billed Medicaid for these services using Dr. Baer's provider number. After learning of Petrus's suspension from Medicare and Medicaid and that Petrus had used his provider number, Dr. Baer disassociated himself from Petrus and the Eye Center of Austin on January 24, 1984.

A federal grand jury began investigating Petrus for submitting false Medicare and Medicaid claims and subpoenaed Dr. Baer and the staff of the Eye Center of Austin. Petrus had asked Dr. Baer to keep him abreast of any further contacts he had with government investigators in the case. When Dr. Baer called Petrus to inform hem that he would be testifying before the grand jury, Petrus repeatedly told Dr. Baer that if asked about specific patients and whether he had treated them, Baer should testify that he could not remember. As part of his cooperation with government investigators, Dr. Baer recorded this telephone conversation. This recorded conversation formed the basis for the government's allegations in Count 31 of the indictment, to which Petrus pleaded guilty. In another conversation on the same day, Petrus told Dr. Baer that he should testify that he could not remember the facts whenever he was asked about anything that

would require giving testimony which was damaging to Petrus.

On July 18, 1986, Petrus filed his first 28 U.S.C. § 2255 petition, challenging the district court's acceptance of his guilty plea and the effectiveness of his counsel. Following an evidentiary hearing before a magistrate judge, the district court denied Petrus's petition. This Court affirmed the district court's judgment in an unpublished opinion. *United States v. Petrus,* No. 87-1932 (5th Cir. Dec. 1, 1988) (unpublished) (*Petrus II*).

On April 1, 1992, Petrus filed a second 28 U.S.C. § 2255 petition.[4] In this petition, Petrus raised four issues:

> (1) his conviction for obstruction of justice was improper because attempting to persuade the testimony of a witness is not a violation of 18 U.S.C. § 1503;
>
> (2) his convictions for Medicare and Medicaid fraud were improper because his action did not constitute criminal violations, but were solely civil violations;
>
> (3) his 1983 suspension from Medicare and Medicaid violated the due process clause and the double jeopardy clause;
>
> (4) his plea of guilty was involuntary.

In a June 15, 1993, supplemental response to Petrus's

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[4] On July 14, 1988, Petrus was released on parole after serving thirty-six months in prison. When he filed his second section 2255 motion, Petrus remained on parole. A person on parole is deemed "in custody" for purposes of section 2255. *United States v. Drobny*, 955 F.2d 990, 995-996 (5th Cir. 1992). The district court stated that Petrus's parole was scheduled to expire in July 1993.

second section 2255 motion, the government argued that the motion should be denied pursuant to Rule 9(b) of the Rules Governing Section 2255 Proceedings. In an order dated June 29, 1993, the district court denied Petrus's motion under Rule 9(b) as relitigating the same issues as his first section 2255 petition and for abuse of the writ by raising new grounds in a successive motion. Petrus now appeals the district court's denial of his second § 2255 motion.

Discussion

I. Rule 9(b) Dismissal

Under Rule 9(b), the district court may dismiss a second or successive § 2255 petition if it finds that (1) the petition fails to allege any new grounds for relief or, (2) if new grounds are alleged, failure to assert those grounds in a prior petition renders the present petition an abuse of the writ. We review a district court's dismissal of a habeas petition as abusive or successive for abuse of discretion. *McGrary v. Scott*, 27 F.3d 181, 183 (5th Cir. 1994).

Absent a showing of cause and prejudice by the habeas petitioner, a court will ordinarily not reach the merits of: (1) successive claims that raise the same grounds as those heard and decided on the merits in a prior petition; or (2) new claims not raised in a prior petition that constitute an abuse of the writ. *Sawyer v. Whitley*, 112 S.Ct. 2514, 2518 (1992). For new or different claims raised for the first time in a successive petition, the cause prong of the standard requires the habeas petitioner to show a legitimate excuse for failing to include the new claim in a previous § 2255 petition. *McCleskey v. Zant*, 111 S.Ct. 1454, 1472 (1991). To satisfy the cause standard in the abuse of the writ context, the habeas petitioner must demonstrate that some "external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented [the] petitioner from raising the claim." Id. Once the petitioner has established cause, he must show "'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 102 S.Ct. 1584, 1594 (1982).

Even if a habeas petitioner cannot meet the cause and prejudice standard, a federal court may hear the merits of a successive petition if the failure to hear the claims would constitute a fundamental miscarriage of justice. *Sawyer*, 112 S.Ct. at 2518. In order to show a fundamental miscarriage of justice, a habeas petitioner must "'establish that under the probative evidence he has a colorable claim of factual innocence.'" Id. at 2519 (quoting *Kuhlman v. Wilson*, 106 S.Ct. 2616, 2627 (1986)); see *Jones v. Whitley*, 938 F.2d 536, 541 (5th Cir.), cert denied, 112 S.Ct. 8 (1991)(explaining that a "'fundamental miscarriage' implies that a constitutional violation probably caused the conviction of an innocent person").

This Court has held that a district court should not summarily dismiss a habeas petition under Rule 9(b) without giving the petitioner an opportunity to respond to the allegations of repetition or abuse. *Brown v. Butler*, 815 F.2d 1054, 1057 (5th Cir. 1987). "At a minimum ... the petitioner must be given specific notice that the court is considering dismissal and given at least 10 days in which to explain the failure to raise the new grounds in a prior petition." *Urdy v. McCotter*, 773 F.2d 652, 656 (5th Cir. 1985). We have strictly construed this notice requirement. *Johnson v. McCotter*, 803 F.2d 830, 832 (5th Cir. 1986). This notice must inform the petitioner that dismissal is being considered, that dismissal will be automatic if petitioner fails to respond, and that the response should present facts rather than conclusions or opinions. Id. We have previously noted that the model Rule 9 form is the preferred practice for providing notice. *Urdy*, 773 F.2d at 657.

Although Petrus does not raise the issue on appeal, our review of the record reveals that the district court did not furnish Petrus with the requisite notice and opportunity to respond. This Court has previously observed that a district court's failure to provide the petitioner with the required notice before dismissal under Rule 9(b) may be harmless error in certain circumstances. *Williams v. Whitley*, 994 F.2d 226, 230 n.2 (5th Cir.), cert. denied, 114 S.,Ct. 608 (1993). *See, e.g., Matthews v. Butler*, 833 F.2d

1165, 1170 n.8 (5th Cir. 1987)("failure to notify the petitioner may be harmless error in cases where there are no facts that the petitioner could allege to prevent his claim from being dismissed under Rule 9(b).").

Despite the district court's failure to fully abide by the mandates of the notice requirement, our review of the record convinces us that there are no facts Petrus could have alleged to avoid dismissal under Rule 9(b). Accordingly, the district court's failure to notify Petrus of its intention to dismiss his second petition under Rule 9(b) was harmless error (and certainly not the character of unassigned error for which we should reverse on our own motion).

On appeal, Petrus asserts that the facts of his case satisfy the cause and prejudice standard and that failure to consider the merits of his second § 2255 petition would constitute a fundamental miscarriage of justice. Petrus relies on what he labels "newly discovered evidence in the form of sworn testimony from the civil hearing, documents from the FOIA/PA suit, admissions from the agency, amendments from congress [sic], and recent decisions from this and other Circuits."

Initially, we note that two of Petrus's claims were also raised in his first § 2255 petition, the applicability of 18 U.S.C. § 1503 to witnesses and the voluntariness of his guilty plea. In his petition, Petrus's ineffective assistance of counsel claim assailed his attorney for not attacking his conviction under 18 U.S.C. § 1503 on the grounds that it does not apply to witnesses. This Court rejected this argument and held that 18 U.S.C. § 1503 applies to witnesses. *Petrus II* at 16. Likewise, this Court rejected Petrus's argument in his first § 2255 petition challenging the validity of his guilty plea. Id, at 8-12. Petrus's references to recent court decisions and his rehashing of the very arguments already rejected by this Court in his first § 2255 petition do not amount to cause.

Petrus next contends that his actions were not criminal

violations but solely civil violations. Petrus argues that it is only a felony offense to make false statements as part of a scheme to charge for services not rendered or to bill for more extensive services than provided. We note that this argument is essentially identical to Petrus's claim in his first petition that he did not commit Medicare/Medicaid fraud because the services for which he billed were actually performed and necessary. In a effort to establish cause for raising this claim in a successive petition, Petrus proffers a statement by the Inspector General in a subsequent administrative proceeding as a binding interpretation of the law governing Medicare/Medicaid fraud. Regardless of the merits of this argument, we find that Petrus cannot establish cause and thus may not raise this argument in a successive petition. *United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993)(holding that ignorance of the facts and legal theories underlying a habeas petitioner's claim does not constitute cause unless some external force such as government interference prevented raising the claim in a previous petition).

Raising the argument for the first time in his second petition, Petrus asserts that he never treated the patients in question and that he never used another doctor's provider number for the patients he did treat; rather, he asserts that his office staff used the provider number of the doctor whom they saw treat the patient. Petrus entered a plea of guilty to two counts of Medicare/Medicaid fraud after the government's lengthy recitation of the factual basis supporting the charges. In summarizing the factual basis for Counts 10 and 24, the government alleged that the evidence would show that Petrus provided medical services to Medicare and Medicaid patients using the provider numbers assigned to Drs. Malsky and Baer. Plainly, Petrus knew whether he provided the medical services in question at the time. Therefore, Petrus cannot rely on any alleged inconsistencies in various witnesses' testimony at a subsequent civil hearing as newly discovered evidence of facts of which he had personal knowledge at the time he entered his plea of guilty. Accordingly, Petrus cannot establish cause for failing to raise this argument in his first § 2255 petition.

Petrus also raises double jeopardy and due process arguments for the first time in his second petition. Petrus has also failed to establish cause for failing to raise these claims in his first § 2255 petition. Having determined that Petrus cannot establish cause, we need not reach the prejudice prong of the analysis. Finally, we do not find that a fundamental miscarriage of justice would result from a failure to entertain Petrus's second petition. Our review of the record supports our conclusion that Petrus has failed to establish a colorable claim that constitutional error resulted in the conviction of one who was actually innocent.

Based on our review of the record, we find that even if the district court had given Petrus an opportunity to respond to allegations of repetition and delay, he would not have been able to allege any facts to avert dismissal under Rule 9(b). Accordingly, we are unable to say that the district court abused its discretion in dismissing Petrus's second § 2255 petition under Rule 9(b).

II. Merits of Petrus's Claims

Even if the district court's failure to adhere to the notice requirement were not harmless, we would still affirm the judgment of the district court because all of Petrus's claims fail on the merits.

A. Section 1503 Issue

Petrus challenges his obstruction of justice conviction on the ground that attempting to persuade the testimony of a witness is not a violation of 18 U.S.C. § 1503. As Petrus correctly observes, 1982 congressional amendments to section 1503 deleted all references to witnesses and at the same time enacted 18 U.S.C. § 1512, expressly addressing threats, force, or intimidation directed at witnesses.[5] This Court, however, has held that Congress did not

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[5]Section 1503 currently reads:

"Whoever corruptly, or by threats or force, or by any

intend that urging or advising a witness to testify falsely be exempt from prosecution under the omnibus clause of section 1503. *United States v. Branch*, 850 F.2d 1080, 1082 (5th Cir. 1988), cert. denied, 109 S.Ct. 816 (1989); *United States v. Wesley*, 748 F.2d 962, 964 (5th Cir. 1984), cert. denied, 105 S.Ct. 2664 (1985). When we rejected this identical claim in Petrus's first section 2255 petition, we stated "the face of the language of § 1503 still applies to witnesses even though the statute does not specifically refer to witnesses." *Petrus II* at 16. The Court's holding regarding the applicability of section 1503 to witnesses has not changed in the intervening time between Petrus's first and second section 2255 petitions. *See United States v. Williams*, 874 F.2d 968, 977 n.25 (5th Cir. 1989)(reaffirming this Circuit's interpretation that section 1503 still applies to witnesses). Accordingly, Petrus's claim that his conduct was not covered by the statute under which he was convicted is without merit.[6]

> threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States ... or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1503.

[6] Petrus's misplaced reliance on Second Circuit decisions such as *United States v. Masterpol*, 940 F.2d 760, 763 (2d Cir. 1991), does not bolster his argument. Indeed, in *Wesley*, this Court explicitly rejected the Second Circuit's contrary interpretation of the 1982 congressional amendments. *Wesley*, 748 F.2d at 964.

Moreover, Petrus's reliance on this Court's citation, in *United States v. Pofahl*, 990 F.2d 1456, 1482 (5th Cir. 1993), to the *Masterpol* holding in a discussion of sentence enhancement under the Sentencing Guidelines is equally misplaced. Despite Petrus's valiant efforts to elevate this passing reference to a holding, the law of the Fifth Circuit

B. Medicare and Medicaid Fraud Convictions

Petrus next argues that his submission of claims to Medicare and Medicaid when he was a suspended provider is not a criminal violation. In his first section 2255 petition challenging the voluntariness of his guilty plea, Petrus asserted that he did not commit Medicare/Medicaid fraud because the services for which he submitted bills were actually performed and necessary. In essence, Petrus argued that the submission of false statements or misrepresentations was only a crime under the fraud statutes when they were submitted in connection with services that were either unnecessary or unperformed. Rejecting Petrus's argument in his first petition, this Court held that "Petrus's conduct falls squarely within the conduct plainly prohibited by the Medicare/Medicaid fraud statutes." *Petrus II* at 11.

Petrus now attempts to resurrect this argument in his second petition. He relies on an excerpt from the Inspector General's Response to Respondents' Exceptions in the civil proceeding against him and the Eye Center of Austin, *Inspector General v. Edward J. Petrus., Jr. M.D., and the Eye Center of Austin*, DAB No. C-147: "The submission of claims to the Medicare or Medicaid programs for services provided by a suspended provider is not a violation of the criminal law. It is solely a CMPL [Civil Monetary Penalties Law] violation." Petrus, however, was not convicted of submitting claims to Medicare and Medicaid while suspended. Rather, he was convicted of submitting false Medicare and Medicaid claims. Undaunted, Petrus asserts that "[i]t is only a felony offense to make a false statement in order to charge for services not rendered, and billing for more extensive services than actually provided, while the provider is in the program." Petrus apparently derives this conclusion from the Inspector General's statement.

Aside from the fact that he was never convicted of

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remains that section 1503 applies to witnesses.

submitting claims while suspended, Petrus misconstrues the Inspector General's statement and ignores its context. Contrary to Petrus's interpretation, the Inspector General's statement did not specifically characterize the conduct underlying the two relevant counts of conviction (Counts 10 and 24) as noncriminal. Moreover, the statement in no way questions the propriety of Petrus's two convictions for submitting false statements.

Indeed, in its Response to Respondents' Exceptions, the Inspector General argued that the criminal sanctions imposed against Petrus and the Eye Center of Austin for some 271 violations of law. The Inspector General stressed that more than a third of the 271 items or services included in the civil case "do not specifically relate to the type of conduct for which respondent Petrus was convicted i.e., false statements." As an example, the Inspector General observed that submission of Medicare/Medicaid claims for services provided by a suspended provider is not a criminal violation. Taken in this context, the Inspector General's statement does not advance Petrus's novel theory that the submission of false statements is only a felony if it involves billing Medicare or Medicaid for services that were never rendered or for more extensive services than actually necessary. This Court has already rejected another similar theory espoused by Petrus in his first petition: "Nothing in the plain language of the statutes, their legislative histories, or the pertinent case law even remotely evinces that these statutes apply *only* in those instances where the services are either not performed or are not necessary." *Petrus II* at 11. (emphasis in original). Thus, Petrus's argument that his conduct did not constitute criminal violations is without merit.[7]

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[7] Petrus also alleges that the prosecution withheld exculpatory evidence from him in violation of *United States v. Bagley*, 105 S.Ct. 3375 (1985). Here, Petrus again argues that his actions did not amount to criminal violations and goes on to chastise the prosecution for not informing the grand jury that his actions amounted to solely civil violations. To the extent that this argument repeats his argument that his actions were civil and not criminal violations, we reject it.

In this argument, Petrus also raises several alleged

In his argument attacking his Medicare and Medicaid fraud convictions, Petrus also asserts that he never treated the patients in question and never used another doctor's provider number. He maintains that his staff used the provider number of the physician whom they saw treat the patient. Petrus raises this argument for the first time in his second section 2255 Petition. It is evident that Petrus knew whether he saw these patients when he entered his plea of guilty in 1985. Petrus's belated denials raised for the first time in his second section 2255 petition, some seven years after he entered his guilty plea, must fall on deaf ears. Because Petrus clearly knew whether he provided the medical services in question at the time of his plea agreement, we can find no reason to upset a plea of guilty that this Court has already upheld as knowing and voluntary. *Petrus II* at 8-12. Furthermore, Petrus has failed to provide any justifications for us to depart from this holding. Accordingly, we must reject Petrus's claim that his conduct did not amount to a violation of the criminal law.

C. Guilty Plea

Petrus also agues that his guilty plea was involuntary because it was based on erroneous advice of his attorney. Petrus claims that his attorney did not understand what conduct was prohibited by the Medicare/Medicaid fraud statutes. In his first section 2255 petition, Petrus challenged the voluntariness of his guilty plea on grounds that the district court did not properly inform him of the nature and elements of the charges against him and that the factual basis of the charges failed to establish the commission of a crime. Affirming the denial of Petrus's first petition, this Court held: "Petrus's plea was truly voluntary. He was properly and adequately advised of the nature and elements of the charges against him, and he freely admitted doing what he was

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inconsistencies in testimony at the administrative proceeding. Based on these inconsistencies, Petrus surmises that the prosecution withheld exculpatory evidence form him. Based on our review of the record, we find these allegations completely without merit.

charged with in both the indictment and the factual basis." *Petrus II* at 12.

Petrus bases his present attack on his guilty plea on his above stated contention that his conduct did not violate any criminal statutes. Because we reject his argument that his conduct was not covered by the statutes under which he was convicted, we must reject his claim that his plea of guilty was not voluntary and knowing.[8]

D. Double Jeopardy and Due Process Claims

Petrus next argues that his 1983 suspension from Medicare and Medicaid violated both double jeopardy and due process. Petrus maintains that his 1983 suspension violated the Double Jeopardy Clause because it was based on a withdrawn 1979 state conviction, thereby punishing him twice for the same offense. Petrus then asserts that his federal conviction should be overturned because it was based on conduct that occurred during the invalid 1983 suspension.

Petrus's second section 2255 petition challenges his 1985 federal criminal convictions of two counts of submitting false Medicare/Medicaid claims and one count of obstruction of justice. Petrus's double jeopardy argument, however, attacks his two suspensions for the same conduct. Petrus is not claiming that his 1985 conviction constituted double jeopardy; rather, he claims that the 1983 suspension was double jeopardy. Because Petrus's 1985 conviction involved the submission of false claims to Medicare and Medicaid and is independent of his 1983 suspension, we hold that Petrus's double jeopardy claim is not cognizable in a section 2255

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[8] In his motion for summary judgment in his second section 2255 petition, Petrus argued that the government breached the plea agreement. However, Petrus appears to have abandoned this argument on appeal because he does not raise it in his brief file with this Court. Regardless, we find this argument without merit.

petition attacking his 1985 conviction.

Petrus also complains that the 1983 suspension violated his due process rights. Apparently, Petrus treats the 1983 settlement in which he agreed to a six-month suspension from Medicare and Medicaid as a contract between himself and the Department of Health and Human Services. Petrus then alleges that the government anticipatorily breached the contract by indicating its intent to prosecute him before the end of the suspension period. Because Petrus sees the so-called contract as property, he contends that the government's alleged breach constitutes a taking of his property without due process.

Relief under 28 U.S.C. § 2255 is reserved for violations of constitutional rights and for a narrow range of injuries in federal criminal cases that could not have been raised on direct appeal and would result in a fundamental miscarriage of justice. *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992); *see Davis v. United States*, 94 S.Ct. 2298, 2305 (1974). Because Petrus casts his due process argument as a breach of contract claim, we hold that it is not cognizable in a section 2255 petition.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

Filed December 27, 1994

APPENDIX B

COUNT THIRTY-ONE (18 U.S.C. § 1503)

That on or about March 7, 1984, in the Western District of Texas, Defendant Edward Joseph Petrus, Jr., M.D., corruptly did endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Western District of Texas in that the Defendant, knowing that one Dr. Gregory Baer would likely appear before a federal grand jury in said District inquiring into possible violations of federal laws relating to submission of false Medicare and Medicaid claims, that is, Title 42, United States Code, Sections 1395nn and 1396h, urged, advised and attempted to persuade the said Dr. Gregory Baer to give false testimony before said grand jury in relation to the aforesaid violations, in violation of Title 18, United States Code, Section 1503.

APPENDIX C

COUNT TEN [42 U.S.C. § 1395nn(a)(2)]

That on or about July 12, 1983, in the Western District of Texas, Defendant Edward Joseph Petrus, Jr., M.D., willfully and knowingly did cause to be made a false statement and representation of a material fact for use in determining his rights to Medicare benefits and payments under Subchapter XVIII of Chapter 7, Title 42, United States Code, in that on or about said date the Defendant caused to be submitted a Health Insurance Claim Form stating and representing that another medical doctor provided medical services for Sallie Rogers on June 16, 1983 and July 11, 1983 whereas, in truth and fact, as the Defendant well knew at the time said claim was submitted, the Defendant had provided such medical services while he was suspended from eligibility for Medicare benefits and payments, in violation of Title 42, United States Code, Section 1395nn(a)(2).

APPENDIX D

House Report 100-169, June 18, 1987, was submitted in conjunction with the Criminal Law and Procedures Minor Substantive and Technical Amendments Act of 1987. This House Report was listed as a "related Report" (1988 U.S. Code Cong. and Admin. News, p. 5937).

> Section 1512(b) of title 18, United States Code, prohibits engaging in coercive conduct (intimidation, use of physical force, or threats) or "misleading conduct" with intent to hinder, delay, prevent, or dissuade a person from attending or testifying in an official proceeding or reporting to a Federal law enforcement officer the possible commission of a federal offense. Federal courts have divided over whether noncoercive conduct that does not fall within the definition of "misleading conduct" (and thus is not criminal under 18 U.S.C. § 1512(b)) can be prosecuted under the residual clause of 18 U.S.C. 1503, which prohibits corrupt endeavors to influence, obstruct, or impede the due administration of justice.
>
> Section 19(c) of the bill resolves this conflict by amending 18 U.S.C. § 1512(b) to proscribe "corrupt persuasion." It is intended that culpable conduct" be prosecuted under 18 U.S.C. § 1512(b), rather than under the residual clause of 18 U.S.C. § 1503. Section 19(c) of the bill, therefore, will permit prosecution of such conduct in the Second Circuit, where such prosecutions cannot now be brought, and will in other circuits result in such prosecutions being brought under 18 U.S.C. § 1512(b).

APPENDIX E

In 1977 the House version of the Medicare/Medicaid Antifraud and Abuse Amendments was passed. P.L. 95-142 (1977). One of the main purposes of the new amendments was to modify the penalty provisions in existing laws which related to those persons providing services under Medicare and Medicaid. H. Rep. No. 95-393, 95th Cong., 2d Sess. 39 (1977), reprinted in 1977 U.S. Code Cong. & Ad News 3039, 3041. The pertinent portions of the House Report relevant to physicians are as follows:

D. INDEPENDENT PRACTITIONERS

An independent practitioner's income from medicaid and medicare is based in part on the volume and complexity of the services he provides. Thus, for the practitioner, program fraud and abuse covers a broad spectrum of practices, ranging form the rendering of services or arguable medical necessity to such criminal offenses as filing false claims.

There is much less evidence of fraud and abuse among practitioners than by nursing homes, medicaid mills, and independent laboratories. However, there is no way to estimate the extent to which fraud and abuse by practitioners has gone undetected. Much of the evidence that has been collected in these other areas has been based on the testimony of associates, a review of business records, and other investigative techniques that are impractical or less suitable for the review of an individual practitioner's activities. Detection and proof of fraud or abuse by an individual practitioner must often depend on the patient, who may well be both old and sick, and without medical knowledge. In any case, whatever its true extent might be, it is clear that the potential for exploitation exists for those practitioners that choose to cheat medicaid and medicare.

Perhaps the *most flagrant fraud involves billings for patients whom the practitioner has not treated.* A related form of fraud involves *claims for services to a practitioner's patients that*

were not actually furnished and intentionally billing more than once for the same service.

Furnishing *excessive services* is probably the most costly noncriminal abuse faced by the health benefit programs. At the same time, it is relatively difficult to prove and correct. Since the medical needs of a particular patient can be highly judgmental, it is difficult to identify program abuse in a practical manner unless the overutilization is grossly unreasonable.

H.R. 3 is designed to strengthen the ability of the Federal and State governments to *find and correct abuse and to detect and prosecute fraud. Fraud involves an intentional deception or misrepresentation, with the intent of receiving some unauthorized benefit for the individual engaged in fraud. In the health area, examples of fraud include: billing for services not rendered, misrepresentation of services rendered, kickbacks, deliberate duplicate billing, false or misleading entries on cost reports, and so forth.* Program abuse is less clearly defined and includes activity wherein providers, practitioners, and suppliers of services operate in a manner inconsistent with accepted, sound medical or business practices, resulting in excessive and unreasonable financial cost to either medicare or medicaid. Included in the area of abuse are the provision of unnecessary health services and the provision of necessary care in unnecessary costly settings. (Emphasis supplied).

Id, at 3049-50

(2)
Supreme Court, U.S.
FILED
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term 1994

Edward J. Petrus, Jr.

Petitioner

v.

United States of America

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

Edward J. Petrus, Jr.
3413 Spanish Oak Dr.
Austin, Texas 78731
(512) 454-6500
Petitioner Pro Se

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EDWARD J. PETRUS, JR.	)	
	)	
v.	)	A-92-CA-182 SS
	)	
UNITED STATES OF AMERICA	)	

Order

Be it remembered on the 2 day of June, 1993, came on to be heard and considered Edward J. Petrus, Jr.'s "Motion to Vacate, Set Aside, or Correct Sentence," under 28 U.S.C. § 2255. Having considered the motion, reviewed the file and considered the arguments, the evidence and the subsequent briefs, the Court believes the motion should be denied.

On May 5, 1985, Petrus pled guilty to the federal offenses of submitting a false Medicare Claim in violation of 42 U.S.C. § 1395nn(a)(2); submitting a false Medicaid Claim in violation of 42 U.S.C. § 1396h(a)(2); and obstruction of justice in violation of 18 U.S.C. § 1503, and was sentenced to nine years imprisonment.[1] He did not file a direct appeal of his sentence. He did, however, file a motion to reduce his sentence pursuant to Fed. R. Crim. P. 35(b). The district court denied relief and the Fifth Circuit affirmed.

On July 18, 1986, Petrus filed his first "Motion to Vacate, Set Aside, or Correct Sentence" under 28 U.S.C. § 2255. In his

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[1]Petrus pled guilty to 3 counts - counts 10, 24 and 31 - of a 36 count indictment. The remaining counts were dismissed on motion by the government.

first motion, Petrus alleged his pleas of guilty were not entered knowingly and voluntarily and he had ineffective assistance of counsel. The district court referred the motion to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Rule 1(e) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended, effective March 1, 1982, for a report and recommendation. The Magistrate Judge conducted an evidentiary hearing and issued a written recommendation that the motion be denied. The district court, after conducting a de novo review, adopted the Magistrate Judge's recommendation and denied Petrus' motion. Petrus appealed to the Fifth Circuit which affirmed the district court's judgment in an unpublished written opinion. See, United States of America v. Petrus, No. 87-1932, filed December 1, 1988.

On April 1, 1992, Petrus filed the instant "Motion to Vacate, Set Aside, or Correct Sentence" pursuant to 28 U.S.C. § 2255; his second such motion relating to his 1985 conviction. In this motion, Petrus claims:

> (1) his conviction under 18 U.S.C. § 1503 was improper because attempting to persuade the testimony of a witness is not a violation of § 1503;
>
> (2) his convictions for Medicare and Medicaid were improper because his actions did not constitute criminal violations, but rather were civil in nature;
>
> (3) his Medicare and Medicaid suspension violated due process and the double jeopardy clause; and
>
> (4) his plea was involuntary and the government violated the terms of the plea agreement.

28 U.S.C. § 2255 provides a procedure whereby an individual may challenge a federal conviction. It states:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Section 2255 requires that the petitioner be "in custody." Petrus was out of prison at the time he filed this motion. He was, however, still on parole. One on parole is "in custody" within the meaning of Section 2255. See, U.S. v. Drobney, 955 F.2d 990, 995-996 (5th Cir. 1992). The Court is informed his parole expires July 1993.

The government argues Petrus' motion should be dismissed pursuant to Rule 9(b), Rules Governing Section 2255 Proceedings for the United States District Copurts, 28 U.S.C. foll. § 2255, because Petrus has failed to raise grounds that are new or different than those previously determined, and to the extent the grounds now raised could be considered new or different, they should be dismissed as an abuse of the writ. Furthermore the government argues, even if the Court reaches the merits of the motion, the motion should be denied. See, "Government's Supplemental Response to Motion to Vacate, Set Aside, or Correct Sentence" filed June 15, 1993, 3.

Rule 9(b), Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. foll. § 2255 provides:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, or if new and different grounds are alleged, the judge finds that

> the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

In "ground four" of his motion, Petrus asserts his plea was involuntary and the plea agreement was violated by the government. To support this assertion he states his "attorney did not understand what conduct was proscribed to violate the Medicare/ Medicaid fraud statutes" and "[a]ny guilty plea was involuntary because it was based on erroneous advice of his attorney." See, "Motion to Vacate, Set Aside, or Correct Sentence" filed April 1, 1992, 6. These same grounds were raised in his first Section 2255 motion and rejected on the merits. The Fifth Circuit in affirming the district court's denial of Petrus' motion stated: "Based on the foregoing, Petrus' plea was truly voluntary. He was properly and adequately advised of the nature and elements of the charges against him, and he freely admitted doing what he was charged with in both the indictment and the factual basis." See, Fifth Circuit Opinion, United States of America v. Edward Joseph Petrus, Jr., filed December 1, 1988, 12. The Fifth Circuit likewise rejected his claims of ineffective assistance of counsel. See, Id. 12-19. Since these are the same grounds he raised in his prior Section 2255 motion and the prior motion was decided on the merits, he is precluded from raising these grounds again. See, Rule 9(b), Rules Governing Section 2255 Proceedings for the United States District courts, 28 U.S.C. foll. § 2255.

Rule 9(b) also provides that a Section 2255 motion may be dismissed for abuse of the writ but does not define what constitutes "abuse." The Fifth Circuit addressed this issue in U.S. v. Flores, 981 F.2d 231 (5th Cir. 1993). Relying on McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454 (1991), the Fifth Circuit stated that a second or subsequent Section 2255 motion which raises a claim for the first time is generally regarded as an abuse of the writ. See, Flores, 981 F.2d at 234. quoting McCleskey, 112 S.Ct. at 1457. However, the failure to raise a ground for relief in the initial motion "will be excused if the petitioner can show (1) cause

for his failure to raise the claim, as well as prejudice from the errors which form the basis of his complaint; or (2) that the court's refusal to hear the claim would result in a fundamental miscarriage of justice." Flores, 981 F.2d at 234.

The first way to avoid dismissal under Rule 9(b) is to show cause and prejudice. "The 'cause' prong of this standard requires the movant to show that some objective factor external to his defense prevented him from raising the claim in his initial [Section 2255] motion." Id. at 235. Governmental interference is an example of an objective factor external that will satisfy the "cause" requirement. Id at 236. Ignorance of the law and/or facts underlying the petitioner's claim, however, does not constitute "cause" because neither is an objective external factor to his defense. Id. Furthermore, a petitioner's pro se status does not constitute "cause." id. Petrus claims he was ignorant of the law and/or facts at the time of initial motion. As stated, however, this does not constitute "cause." Petrus has not shown "cause" for failing to raise any of his claims in his initial Section 2255 motion. The Court, therefore, does not need to decide whether he has shown prejudice.

Although Petrus has not shown cause and prejudice, the court will hear his claims if failing to do so would result in a fundamental miscarriage of justice. A fundamental miscarriage of justice exists if a constitutional violation probably caused Petrus to be convicted of a crime of which he is innocent. Id. Grounds One and Two are not constitutional in nature and thus do not rise to the level of constitutional violations.[3] Ground Three is constitutional in nature. However, Petrus does not contend he is innocent

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[3]Furthermore, the Fifth circuit has held that 18 U.S.C. § 1503 makes it a crime for anyone to intentionally urge or advise a witness to testify falsely. See, U.S. v. Williams, 874 F.2d 968, 977 n. 25. (5th Cir. 1989)

in Ground Three.[2] He only contends his Medicaid suspension violated double jeopardy, the alleged delay in implementing his suspension from Medicare was a violation of due process, the Department of Health and Human Service's alleged "bounty system" precluded a fair hearing threrby violating Petrus' due process rights, and the government breached the suspension agreement "and any violation regarding the suspension was invalid." Since Petrus does not contend he is innocent, his "motion does not fit within the narrow category of Section 2255 proceedings which implicate a fundamental miscarriage of justice" and will be dismissed. Id.

IT IS ORDERED that Edward J. Petrus' "Motion to Vacate, Set Aside, or Correct Sentence" is DENIED and DISMISSED.

IT IS FURTHER ORDERED that this is a final order in this cause.

Entered the 29th day of June, 1993.

Sam Sparks United States District Judge

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[2]Petrus does contend he is innocent of the Medicare and Medicaid fraud offenses, 42 U.S.C. § 1395nn and 1396h. Petrus asserts he is innocent because his provider authority had been suspended and therefore he could not, as a matter of law and as he construed the position of the United States in his civil litigation, be criminally responsible. However, it was a violation of these statutes for an individual to "knowingly and willfully make[] or cause[] to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment." Requesting payment when the individual knows he is not entitled to payment would violate the statutes. Petrus knew he was on suspension and not entitled to payment. He therefore violated the statutes when he requested payment, albeit under another provider's number.